Supreme Court, U.S.
FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1770

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF THE AMERICAN MEAT INSTITUTE IN SUPPORT OF PETITIONER

ROBERT G. HIBBERT
MONTE B. LAKE *
DOMINIC T. BODENSTEINER
HERON, BURCHETTE, RUCKERT & ROTHWELL
1025 Thomas Jefferson St., N.W.
Suite 700
Washington, D.C. 20007
(202) 337-7700
Attorneys for Amicus Curiae the American Meat Institute

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Where an employer has long maintained a collectively bargained program of benefits for former employees, which treats older employees more favorably than younger employees, may a court dissect the total program into parts and hold that one part, isolated from the remainder, discriminates against older employees under section 4(a)(1) of the Age Discrimination in Employment Act of 1967 (ADEA).

2. Whether a plan that exists and pays benefits fails to qualify as a "bona fide employee benefit plan" within the meaning of section 4(f)(2) of the ADEA, because it lacks age-related cost factors; this same question is now pending before the Court in *Public Employees Retirement System v. Betts*, No. 88-389.

3. Whether an employer whose conduct at the time was not contrary to the law as then pronounced and applied by other federal courts may be held in "willful" violation of the ADEA.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
I. THROUGH AN OVERLY BROAD INTERPRETATION OF THE PROHIBITIONS OF THE ADEA THAT CONFLICTS WITH CONGRESSIONAL INTENT AND THE DECISIONS OF OTHER CIRCUIT COURTS, THE THIRD CIRCUIT'S DECISION WILL IMPEDE EMPLOYERS' ABILITY TO DEVELOP COMPENSATION AND BENEFIT PACKAGES, ESPECIALLY THOSE THAT ARE COLLECTIVELY BARGAINED, THAT UNIQUELY AND FAIRLY MEET THEIR EMPLOYEES' NEEDS	3
A. The Third Circuit's Overly Broad Interpretation Of The ADEA's Prohibitions, In Violation Of Congress' Intent, Will Subject To Legal Challenge Innumerable Equitably Conceived And Administered Severance And Pension Plans	4
B. By Discouraging The Provision By Employers Of Severance And Other Post-Employment Compensation, The Third Circuit's Decision Will Undermine The Purposes Of The ADEA	7
C. Because It Conflicts With The Rulings Of Other Federal Courts Concerning The Propriety Of Post-Employment Benefit Plans Under The ADEA, The Third Circuit's Decision Will Cause Uncertainty And Instability In The Administration Of Such Plans Throughout The United States	8

TABLE OF CONTENTS—Continued

Page

D. The Third Circuit's Decision Not Only Impedes Compliance With The ADEA Through Its Conflict With Rulings Of Other Courts, But Also Creates Further Confusion By Interpreting Section 4(f)(1) Inconsistently With Parallel Provisions Of The Equal Pay Act And Title VII 10

E. The Third Circuit's Decision Unreasonably Intrudes Upon The Ability Of Employers And Unions To Develop Compensation And Benefit Plans That Uniquely And Fairly Meet The Needs Of All Employees Involved In A Plant Closing Or Relocation 14

II. THE THIRD CIRCUIT'S DECISION THAT SECTION 4(f)(2) OF THE ADEA PROTECTS ONLY THOSE BENEFIT PLANS WHICH REFLECT AGE-RELATED COST FACTORS IMPOSES A STANDARD NOT INTENDED BY CONGRESS AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases	Page
Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982)	7, 19
Betts v. Hamilton County Bd. of Mental Retardation, 848 F.2d 692 (6th Cir.), *prob. juris. noted sub nom. Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 256 (1988)	19
Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974)	19
Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985)	9
California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980)	16
Cipriano v. Board of Educ., 785 F.2d 51 (2d Cir. 1986)	19
City of Los Angeles v. Manhart, 435 U.S. 702 (1978)	12, 13
EEOC v. Cargill, Inc., 855 F.2d 682 (10th Cir. 1988)	19
EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988)	19
EEOC v. J.C. Penney Co., 843 F.2d 249 (6th Cir. 1988)	12, 13
EEOC v. USX Corp., No. 87-6044 (E.D. Pa. Mar. 23, 1989) (LEXIS, Genfed library, Dist file)	8, 9
EEOC v. Westinghouse Elec. Corp., 869 F.2d 696 (3d Cir. 1989)	*passim*
EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343 (E.D. Pa. 1986)	2
Karlen v. City Colleges, 837 F.2d 314 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988)	19
Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975)	4, 5
Lemons v. City & County of Denver, 17 Fair Empl. Prac. Cas. (BNA) 906 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980)	6
Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976)	5

TABLE OF AUTHORITIES—Continued

Page

Parker v. Federal Nat'l Mortgage Ass'n, 741 F.2d 975 (7th Cir. 1984) 9
Patterson v. Independent School Dist. #709, 742 F.2d 465 (8th Cir. 1984) 5, 6
Public Employees Retirement Sys. v. Betts, No. 88-389 (U.S. argued Mar. 28, 1989) 19, 20
Trans World Airlines v. Hardison, 432 U.S. 63 (1977) 17
Trans World Airlines v. Thurston, 469 U.S. 111 (1985) 12
United Air Lines v. McMann, 434 U.S. 192 (1977) 6
United Mine Workers v. Robinson, 455 U.S. 562 (1982) 17
Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984) .. 12

Statutes

Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986) ..... *passim*
ADEA § 2(a)(1), 29 U.S.C. § 621(a)(1) 7
ADEA § 2(b), 29 U.S.C. § 621(b) 5
ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1) ..... *passim*
ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) ..... *passim*
ADEA § 12, 29 U.S.C. § 631(a) 7
Equal Pay Act, 29 U.S.C. § 206 (1982) 11, 12
29 U.S.C. § 206(d)(1) 13
29 U.S.C. § 206(d)(1)(iv) 11
Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. IV 1986) ..... *passim*
Title VII § 703(h) 12, 13
Worker Adjustment and Retaining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988) (to be codified at 29 U.S.C. §§ 2101-2109) 15

Regulations

29 C.F.R. § 1625.13 (1988) 5

TABLE OF AUTHORITIES—Continued

Miscellaneous Page

Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts (BNA) No. 167, at 53:4 (Apr. 24, 1986) 17

Hearings on Employment Problems of Older Workers on H.R. 10634 and Similar Bills, Select Subcomm. on Labor of House Comm. on Educ. and Labor, 89th Cong., 1st Sess. (Aug. 25, 31, Sept. 1, 2, 1965) 5

Hearings on S. 830 and S. 788, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967) 7

H.R. Rep. No. 805, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213 4

King, *The ADEA and Employee Benefit Plans*, in *Age Discrimination in Employment Act: Compliance and Litigation Manual for Lawyers and Personnel Practitioners* 307 (M. Lake ed. 1982) 16

Personnel Policies Forum: Severance Benefits and Outplacement Services (BNA) No. 143 (Dec. 1986) 17

Stacy, *A Case against Extending the Adverse Impact Doctrine to ADEA*, 10 Employee Rel. L.J. 437 (1984-85) 12

U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1770

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF THE AMERICAN MEAT INSTITUTE IN SUPPORT OF PETITIONER

The American Meat Institute (AMI), with the written consent of all parties,[1] respectfully submits this brief as Amicus Curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

INTEREST OF AMICUS CURIAE

AMI is a nonprofit corporation organized to promote the interests of the meat packing and processing industry and to assist it in operating responsibly, efficiently, and

---

[1] The written consents of the parties have been filed with the Clerk of the Court.

profitably in the legislative, regulatory, and consumer environments. AMI's membership includes more than 420 companies which prepare and process the full range of meat and meat-food products available in the United States. AMI member companies produce over eighty percent of the federally inspected meat products available to American consumers and employ approximately 129,000 people in their operations. Many of these employees are protected by post-employment benefit plans which have been collectively bargained between AMI member companies and representative unions.

Substantially all AMI member companies are subject to the provisions of the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986) and Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. IV 1986). As such, AMI members are subject to uncertainty and confusion caused by the judgment of the United States Court of Appeals for the Third Circuit in *EEOC v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir. 1989), and therefore submit this brief Amicus Curiae in support of the petition for a writ of certiorari.

STATEMENT OF THE CASE

In 1983, the Equal Employment Opportunity Commission (EEOC) filed this action alleging that an employee benefits program, crafted through many years of collective bargaining between Westinghouse and employee-representative unions, which provided post-employment income protection to employees in the form of severance benefits or pension benefits, but not both, constituted willful age discrimination in violation of the ADEA. The district court found that because pension-eligible employees were ineligible for a second post-employment income stream—severance pay—the benefit plan constituted willful age-based discrimination. *EEOC v. Westinghouse Elec. Corp.*, 632 F. Supp. 343 (E.D. Pa. 1986).

On review, the Third Circuit held, as a matter of law, that "severance pay and pension benefits have distinctly different purposes," and that one may not be substituted for the other. 869 F.2d at 707. Ignoring the fact that Westinghouse's collective bargaining agreements had linked severance benefits and pension benefits since severance benefits were first negotiated in 1960, the court excised the severance provisions from the whole of the challenged benefit plan. Scrutinizing the severance benefit component of the plan alone, the court found a violation of the ADEA because the eligibility criteria for severance pay—ineligibility for pension benefits—was "inexorably linked with age." *Id.* at 706.

The court also ruled that the Westinghouse post-employment benefit plan was not an "employee benefit plan" under section 4(f)(2) of the ADEA. In this connection, it concluded that the severance provisions standing alone were short-term fringe benefits which were not contemplated by the section 4(f)(2) exemption, nor were they "integral components of a comprehensive employee benefits scheme." *Id.* at 710. To constitute an employee benefit plan under section 4(f)(2), the court held that the plan must "involve age-related cost factors." *Id.*

REASONS FOR GRANTING THE WRIT

I. THROUGH AN OVERLY BROAD INTERPRETATION OF THE PROHIBITIONS OF THE ADEA THAT CONFLICTS WITH CONGRESSIONAL INTENT AND THE DECISIONS OF OTHER CIRCUIT COURTS, THE THIRD CIRCUIT'S DECISION WILL IMPEDE EMPLOYERS' ABILITY TO DEVELOP COMPENSATION AND BENEFIT PACKAGES, ESPECIALLY THOSE THAT ARE COLLECTIVELY BARGAINED, THAT UNIQUELY AND FAIRLY MEET THEIR EMPLOYEES' NEEDS.

Like Westinghouse, many employers in the nation's meat packing and processing industry offer post-employment income protection to employees. These benefit plans

are, in many cases, the product of collective bargaining. Commonly, pension and severance benefits are negotiated as integral components of a comprehensive benefits plan. The Third Circuit's decision in this case of nationwide scope disrupts that process in a manner not intended by Congress nor sanctioned by other circuits. In addition to subjecting employers and unions to a rigid new rule which is not consonant with the ADEA, the Third Circuit's decision will disrupt the collective bargaining process and ultimately undermine the purposes of the ADEA. If the decision stands, it will force employers to seriously consider eliminating severance benefit programs or restricting the eligibility for or monetary contributions to pension programs.

A. The Third Circuit's Overly Broad Interpretation Of The ADEA's Prohibitions, In Violation Of Congress' Intent, Will Subject To Legal Challenge Innumerable Equitably Conceived And Administered Severance And Pension Plans.

The court below ignored congressional intent in adopting a rigid and formalistic rule which led to a finding that Westinghouse's post-employment policies concerning severance and pension benefits, as they existed in 1979 and as modified in 1982, were impermissible under the ADEA. In enacting the ADEA, Congress sought to avoid such a mechanical application of its proscriptions. It encouraged flexible application of the Act, taking into account the unique circumstances of each case.[2] The court below, however, adopted an inflexible approach that would find age discrimination in the design of most post-employment benefit plans.

---

[2] *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 n.4 (6th Cir. 1975) (citing H.R. Rep. No. 805, 90th Cong., 1st Sess. 6-7, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213, 2219-20).

The ADEA was clearly intended to prohibit "arbitrary age discrimination." [3] It was not, however, formulated so as to hold employers liable for the mere presence of age, which might be an indirect and harmless part of the structure of a benefit plan.[4] The statutory scheme of the ADEA reflects this intent. Section 4(f)(1) permits otherwise prohibited discrimination where the differentiation is based on reasonable factors other than age. *Patterson v. Independent School Dist. #709*, 742 F.2d 465, 466 n.1 (8th Cir. 1984). Moreover, section 4(f)(2) protects bona fide employee benefit plans which contain a differentiation in benefits based upon age. 29 U.S.C. § 623(f)(2).

Patterson is instructive through its acknowledgment that the ADEA accommodates some differences based on age and that actuarial considerations are essential in evaluating the fairness of employee pension and benefit plans.[5] The court in *Patterson* stated:

---

[3] 29 U.S.C. § 621(b); *Hearings on Employment Problems of Older Workers on H.R. 10634 and Similar Bills*, Select Subcomm. on Labor of House Comm. on Educ. and Labor, 89th Cong., 1st Sess. (Aug. 25, 31, Sept. 1, 2, 1965) (Statement of Secretary of Labor Wirtz).

[4] It is important to recognize that age, unlike race, sex, and other immutable factors protected under Title VII of the Civil Rights Act, is a universal characteristic that can be a benign component of employment policies or practices. For a discussion on this point, see the Secretary of Labor's Report to Congress which became the basis of the ADEA's enactment. U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964, at 2, 5-6 (1965); *see also Laugesen*, 510 F.2d at 313 n.4; *Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299, 1206 (E.D. Mich. 1976).

[5] Further evidence of the ADEA's flexibility in accepting age-based differences where it furthers a reasonable objective is found in the EEOC's Age Discrimination in Employment Act Interpretation on Apprenticeship Programs. 29 C.F.R. 1625.13 (1988). In its guidelines, EEOC concludes that the ADEA does not prohibit limiting entry into apprenticeship programs to youths below a certain age.

> Perhaps a plan (since the purpose of the [4(f)(2)] exemption is to afford practicality and flexibility in applying the prohibition against age discrimination) must be a systematic and interrelated structure where consideration of age is an actuarial necessity in order to attain fairness in computing benefits.

742 F.2d at 467. The court further recognized, quoting Justice White in his concurrence with this Court's decision in *United Air Lines v. McMann*, 434 U.S. 192, 207 (1977), that "all retirement plans necessarily make distinctions based on age." *Patterson*, 742 F.2d at 467.

By breaking Westinghouse's integrated severance and benefit plan into its component parts, finding fault in the slightest perceived variations in entitlements thereunder, and rejecting legitimate actuarial explanations of the plan's provision of benefits, the court below adopted a rigid rule which is not supported by the ADEA and is contrary to clear congressional intent. The decision below did not find arbitrary discrimination—it found a difference in benefits for which it rejected a legitimate explanation permissible under the ADEA. If the Third Circuit's approach is not rejected, the severance and benefit plans of innumerable employers throughout the United States will be subject to legal challenge regardless of the legitimate business or actuarial reasons supporting them.[6]

---

[6] In addition, the courts of this country will be put into the position of passing judgment on the innumerable, varied, and complex pension and benefit plans which are predicated upon actuarial considerations. Surely, Congress did not envision the courts dissecting the nation's compensation and benefit plans in search of minute and inconsequential disparities. *Cf. Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. (BNA) 906, 909 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

B. By Discouraging The Provision By Employers Of Severance And Other Post-Employment Compensation, The Third Circuit's Decision Will Undermine The Purposes Of The ADEA.

Congress' primary purpose in enacting the ADEA was to eliminate discrimination in the hiring of older workers. *Alford v. City of Lubbock*, 664 F.2d 1263, 1270 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982). Congress expressed particular concern about the unemployment of older workers[7] and especially their ability "to regain employment when displaced from jobs."[8] Contrary to this purpose, however, the overly broad view of the prohibitions of the ADEA taken by the Third Circuit below will discourage the provision of post-termination income and have its most harmful impact upon those likely to experience greater difficulty re-entering the job market and thereby defeat a major purpose for the enactment of the ADEA.

In providing an exemption from the prohibitions of the ADEA for employers who observe the terms of bona fide employee benefit plans, Congress attempted to facilitate the hiring of older workers, rather than deter it, by making it possible for them to be employed without disrupting existing benefit plans.[9] Through its dissection of Westinghouse's collectively bargained severance and retirement benefit plan and conclusion that it violated the ADEA, however, the decision below will discourage the voluntary inclusion of severance pay as part of company

---

[7] The use of the term "older employees" herein refers to those age 40 and above protected under the ADEA. 29 U.S.C. § 631(a).

[8] Congressional Statement of Findings and Purpose, 29 U.S.C. § 621(a)(1).

[9] Senator Javits, a primary sponsor of the ADEA, expressed this point on introducing an amendment that became section 4(f)(2) of the ADEA. *Hearings on S. 830 and S. 788*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 27-28 (1967).

benefit packages and collective bargaining agreements.[10] This undesirable result will prove detrimental to all employees who would otherwise benefit from the financial safety net provided by severance pay while they seek new employment. It will be especially harmful to those older employees laid off or terminated after being employed an insufficient period of time to qualify for early or normal retirement income. As noted above, it is this group Congress was particularly interested in protecting when it enacted the ADEA because of the difficulty older workers often experience in finding new jobs. Thus, the position taken by the EEOC and adopted by the court below is inconsistent with and counterproductive to Congress' purpose in enacting the ADEA.

C. Because It Conflicts With The Rulings Of Other Federal Courts Concerning The Propriety Of Post-Employment Benefit Plans Under The ADEA, The Third Circuit's Decision Will Cause Uncertainty And Instability In The Administration Of Such Plans Throughout The United States.

By arbitrarily dividing Westinghouse's plan into component parts, the Third Circuit improperly isolated age as the factor which determined ineligibility for severance benefits. The court's analysis gave little consideration to the nondiscriminatory reason—entitlement to actuarially equal or greater post-employment pension benefits—which determined ineligibility for severance benefits. In effect, it held that such legitimate business reasons cannot constitute reasonable factors other than age. In so ruling, the Court's decision has the practical effect of striking the section 4(f)(1) "reasonable factor other than age" defense from the ADEA in the post-employment benefit

---

[10] *EEOC v. USX Corp.*, No. 87-6044 at 23 (E.D. Pa. Mar. 23, 1989) (LEXIS, Genfed library, Dist file).

plan context.[11] Moreover, the Third Circuit rejected Westinghouse's ADEA section 4(f)(2) defense by holding that, as a matter of law, severance and pension benefits cannot constitute integral parts of a single post-employment income protection plan.[12]

Consequently, the decision below is in conflict with the decisions of other circuits.[13] Other federal courts recognize that an employee's entitlement to other post-employment benefits is an eligibility condition which equalizes, rather than discriminates. *See, e.g., Parker*, 741 F.2d 975; *Britt*, 768 F.2d 593. As such, entitlement to other benefits is a reasonable factor other than age. The Third Circuit decision, however, removes from consideration the pension components of an otherwise integrated benefits package, thus depriving an employer of an opportunity to show that ineligibility for severance pay is based upon a rea-

---

[11] Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), protects any action by an employer "where the differentiation is based on reasonable factors other than age . . . ."

[12] Although the decision represents the law of the Third Circuit, even the district courts in that circuit have expressed concern about following an arbitrary rule of law. *E.g., EEOC v. USX Corp.*, No. 87-6044 at 18 (E.D. Pa. Mar. 23, 1989) (LEXIS, Genfed library Dist file) ("[w]ere this a matter of first impression, I would agree . . . [under] the terms of the pension plan that the severance pay offset [pursuant to which pension payments were reduced to the extent of severance payments received] does not discriminate on the basis of age.")

[13] The Seventh Circuit for example, has upheld the propriety under the ADEA of the denial of severance benefits to a former employee who chose to be retired rather than laid off. *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (7th Cir. 1984). Likewise, the Fourth Circuit has held that "no discrimination within the contemplation of the ADEA resulted" under an integrated plan which linked eligibility for severance benefits with acceptance of deferral of pension benefits. *Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593, 594 (4th Cir. 1985).

sonable factor other than age—entitlement to an equal or greater pension benefit.[14]

Because the decision below conflicts with the holdings of other federal courts, the numerous employers located throughout the United States represented by Amicus are now subject to inconsistent standards with respect to the propriety of post-employment benefit plans under the ADEA. The decision below has caused great uncertainty concerning whether, in reviewing a collectively-bargained pension and severance plan, a court will sanction the existence of reasonable factors other than age, such as an employee's eligibility for post-employment income, or simply ignore this factor and apply the Third Circuit standard. If a court follows the approach of the Seventh and Fourth Circuits, integrated pension and severance benefits plans will survive ADEA challenge. If, however, a court follows the Third Circuit's approach the severance benefit component of the plan will be viewed in isolation, with a likely finding of age-based discrimination.

D. The Third Circuit's Decision Not Only Impedes Compliance With The ADEA Through Its Conflict With Rulings Of Other Courts, But Also Creates Further Confusion By Interpreting Section 4(f)(1) Inconsistently With Parallel Provisions Of The Equal Pay Act And Title VII.

In rejecting Westinghouse's collectively bargained benefit plan, the Third Circuit reached an inexplicable result. It concluded that older employees treated more favorably than younger employees were victims of discrimination. The court reached this ironic result by rejecting Westinghouse's defenses raised under sections 4(f)(1) (reasonable factors other than age) and 4(f)

---

[14] Indeed, the Third Circuit itself recognized that under the Westinghouse plan employees who received pension benefits fared better than employees who received severance pay. 869 F.2d at 705.

(2) (bona fide employee benefit plan) and finding the ADEA is violated regardless of whether employees are adversely affected or subject to arbitrary discrimination. Instead, the court below focused on any difference in treatment regardless of whether it was arbitrary or harmful to older employees. Moreover, it erroneously rejected legitimate explanations for the differences in benefits provided.

Westinghouse put forward a number of legitimate reasons in explanation of its post-employment severance and retirement plan. It explained that denial of severance benefits was based on eligibility for post-termination benefits, seniority, and the dates and reasons for termination. Moreover, Westinghouse established that the value of the retirement package for older employees was equal to or greater than the severance package received by others based upon actuarial calculations. The court rejected these factors, however, and unreasonably found an age element in each one. The result of the court's conclusion is as follows: if age is present in any form in the factors that determine the eligibility for or value of employer provided benefits, an employer will be liable regardless of whether older employees are adversely affected.

The approach taken by the court below not only misconstrues the requirements of the ADEA, but, in addition, creates confusion for employers trying to comply with parallel provisions of Title VII and the Equal Pay Act, both of which provide defenses similar to section 4(f)(1) of the ADEA. The Equal Pay Act and Title VII prohibit sex-related discrimination in compensation and benefits. The Equal Pay Act's "factor other than sex" defense[15] provided the statutory precursor to and conceptual model for the ADEA's section 4(f)(1) reason-

---

[15] The Equal Pay Act excepts from its prohibitions "a differential based on any factor other than sex . . . ." 29 U.S.C. § 206(d)(1)(iv).

able factor other than age defense.[16] Under Title VII and the Equal Pay Act, legitimate business efforts of employers and unions to fashion a satisfactory and affordable employee benefit plan constitute a factor "other than sex" that may protect a company from discrimination claims, even though gender correlations may exist as part of the plan. *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 254 (6th Cir. 1988).[17] In *J.C. Penney*, the Sixth Circuit adopted a "legitimate business reason" standard for determining what constitutes a reasonable "factor other than sex." 843 F.2d at 253. In so doing, the court noted that an employer choosing a comprehensive "benefit package faces the challenge of maximizing employee satisfaction while minimizing or controlling cost." 843 F.2d at 253. Moreover, the court stated emphatically that employers and unions "must be allowed reasonable latitude" in framing such benefit plans. *Id.* at 254.

In a similar case, the Ninth Circuit rejected the EEOC's argument that the decision in *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), prohibits cost-related defenses in cases involving sex-based cost differentials in an employee benefit plan. *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984). In *Wambheim*, the court held that an employer did not discriminate under Title

---

[16] Stacy, *A Case against Extending the Adverse Impact Doctrine to ADEA*, 10 Employee Rel. L.J. 437, 446 (1984-85).

[17] In this case, the Sixth Circuit rejected an EEOC charge of sex discrimination in a company's compensation and benefit plan in violation of Title VII of the Civil Rights Act of 1964. 843 F.2d at 252. Section 703(h) of Title VII incorporates by reference the affirmative defenses to wage discrimination claims which are set forth in the Equal Pay Act (one of which is differentiation based on "any other factor other than sex"). *Id.* Although distinguishable in some circumstances, standards under Title VII are sometimes considered by courts when reviewing age discrimination claims under the ADEA. *E.g., Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

VII in the payment of benefits where it could show sex-related differences were based upon legitimate business justifications.[18]

Thus, an employer like Westinghouse is justified in adopting a plan which attempts to give all its employees "the biggest 'bang for the buck' . . . ," even though it may accomplish its objective through a budget conscious, no "double-dipping" policy. *EEOC v. J.C. Penney Co.*, 843 F.2d at 254. This is especially true where, as in this case, the plan provides benefits of equal or greater actuarial value to the older employees claiming discrimination.

Unless the petition for a writ of certiorari is granted, the Third Circuit's decision will fuel needless confusion in the interpretation of statutory defenses related to compensation and benefits under section 703(h) of the Civil Rights Act and section 206(d)(1) of the Equal Pay Act. Thus, the Third Circuit's decision will not only create confusion for those attempting compliance with the ADEA, but will also exacerbate that confusion by upsetting parallel statutory standards that govern the sex-related components of benefit and compensation plans. This will cause further disruption and inflict needless burdens upon those responsible for developing compensation and pension plans in this country.

---

[18] Certain Title VII standards are inapplicable to the ADEA. For example, this Court in *Manhart*, 435 U.S. 702, rejected under Title VII the use of sex-based actuarial factors which result in differences in benefits. In many ADEA cases, however, including the instant case, it is impossible to ignore age-based actuarial data in pension and retirement-related plans. As noted by this Court in *Manhart*, 435 U.S. at 718, its decision did not "call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan." As also discussed *supra*, footnote 4, Title VII involves immutable characteristics like sex. Age, however, is distinct because it is a universal characteristic.

E. The Third Circuit's Decision Unreasonably Intrudes Upon The Ability Of Employers And Unions To Develop Compensation And Benefit Plans That Uniquely And Fairly Meet The Needs Of All Employees Involved In A Plant Closing Or Relocation.

The decision of the Third Circuit, if allowed to stand, will severely limit the ability of management and labor to tailor programs which suit the unique and particular needs of employees in a given industry and at a given location.

Plant closings, although unavoidable, inflict hardship on all affected employees. The burdens that follow a plant closing do not discriminate. They hurt older workers to be sure, but are no kinder to a young father with children, or a single mother. Thus, it is entirely reasonable and, indeed, essential, that unions and employers strive to develop suitable plans which will help provide a safety net for *all* employees who might be affected by a plant closing or relocation.

Westinghouse and its unions, like employers and unions in many industries, including members of Amicus, have over a long period of time attempted to fairly allocate available resources among all affected workers to help ease the transition associated with a plant closing. The product of this bargaining in Westinghouse's case was a plan which, in cases of plant closure or work relocation, provided employees with one of two basic post-employment benefits—immediate retirement benefits, or severance and deferred retirement benefits—but not both. In finding a violation of the ADEA in this case, the court below has, in effect, prohibited employers and labor unions from establishing integrated severance and pension benefit plans through good faith negotiations.

If the Third Circuit's decision is left standing, it will render invalid and unlawful many similarly integrated programs intended to ameliorate the effects of plant closing or relocation. Because post-employment benefit funds

are not unlimited, the decision below will force employers and unions to reconsider the feasibility of providing severance pay. Before Westinghouse and its unions developed an integrated plan for plant closure, only employees eligible for retirement benefits received benefits at the time of a plant closing. A return to this system would leave workers ineligible for pensions without financial resources for relocation, retraining, and other transition expenses.

Employers and labor unions could also choose to make severance pay available to all employees, but would have to offset the increased cost of severance pay by limiting increases in pension benefits. Such action would produce a result which even the Third Circuit would have to regard as being nondiscriminatory, but which nevertheless would have a negative effect on older employees.[19]

AMI submits that the collective bargaining process provides the most appropriate vehicle for allocating available resources among employees at the time of plant closings or relocations, and that the decision of the Third Circuit unnecessarily intrudes on that process. It is a traditional function of labor unions and the collective bargaining process to attempt to accommodate the interests of all employees. The development of a suitable plant closing program requires that labor and management consider

---

[19] Congress most recently demonstrated its concern about the negative impact of plant closings through the enactment of The Worker Adjustment and Retraining Notification Act (WARN), Pub. L. No. 100-379, 102 Stat. 890 (1988) (to be codified at 29 U.S.C. §§ 2101-2109). In enacting WARN, Congress sought to provide some protection for workers with respect to lay-offs and plant closings by requiring notice of such closings and lay-offs under certain circumstances. Congress, however, did not go as far as the Third Circuit by mandating severance payments to all employees, regardless of entitlement to other post-employment income benefits. Thus, the limited scope of WARN implies a continued congressional desire to defer the issue of post-employment benefits to collective bargaining. Congress saw no need to provide the type of extraordinary benefit to older workers faced with a plant closing now being mandated by the Third Circuit.

a wide variety of information, including the availability of suitable jobs in a locality, the specific demographic characteristics of the work force, the general financial wherewithal of the members of the work force, and the desires of employees to have severance pay, retirement or early retirement options.[20]

Members of AMI have utilized the collective bargaining process to tailor programs that provide employees flexibility in selecting post-employment benefits. For example, companies and unions in the meat industry have historically agreed to plant closing plans that allow employees to select a variety of benefit options, some of which maximize severance benefits and others which enhance retirement income. Under these option plans, the employees decide themselves which benefit option best serves their particular interests. The court below has undermined this freedom of choice by unreasonably tying the hands of the parties and precluding them from developing through collective bargaining benefit plans that uniquely meet their needs.

This Court has in the past recognized the important role that collective bargaining plays in the context of discrimination cases. In upholding the validity of a collectively bargained seniority system, the Court wrote in *California Brewers Association v. Bryant*, 444 U.S. 598, 608 (1980) (citations omitted) that:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. It does not behoove a court to second-guess either that process or its products. Seniority systems, reflecting as they do, not only the give and

---

[20] *See* King, *The ADEA and Employee Benefit Plans*, in *Age Discrimination in Employment Act, A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* 307, 325-27 (M. Lake ed. 1982).

take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes.

In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), this Court upheld a collectively bargained seniority system against a claim that the agreement resulted in unlawful discrimination on the basis of religion, writing that: "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national policy . . . ." *Id.* at 79; *see also United Mine Workers v. Robinson*, 455 U.S. 562, 574-76 (1982).

There was no compelling reason for the court below to undermine a practice which "lies at the core of our national policy." Through bargaining, the parties did establish a fair, comprehensive plan for dealing with plant closings, which in all cases treated older workers at least equal to younger workers, and in many instances more favorably than younger employees.

The impact of the Third Circuit's decision upon the collective bargaining process will be significant. A recent employer survey indicated that eighty-two percent of the respondents paid severance benefits to laid off or terminated employees at some time. *Personnel Policies Forum: Severance Benefits and Outplacement Services* (BNA) No. 143 (Dec. 1986). According to that survey, severance benefits have become more prevalent "[a]s organizations throughout the United States strive to streamline their work forces in the face of tighter budgets, foreign competition, and a growing number of corporate mergers . . . ." *Id.* at 1. It is common for such plans to deny severance benefits to employees who are eligible for pensions. Another survey indicates that approximately forty-five percent of the private collectively bargained benefit plans impose such a restriction. *Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts* (BNA) No. 167, at 53:4 (Apr. 24, 1986).

Given the number of severance plans which are in effect, the substantial number of those plans which deny severance benefits to employees of retirement age, and the nationwide impact of the Third Circuit decision, it becomes readily apparent that thousands of employers and employees will be affected by the decision.

The obvious way to satisfy the rule established by the Third Circuit in this case is to eliminate severance pay or limit pension benefits. It simply is not reasonable to merely assume that employers have the financial wherewithal to pay both existing post-employment benefits and the additional severance benefits mandated by the Third Circuit. Thus, the ultimate result of the Third Circuit's decision will be to upset many pension and severance plans bargained in good faith over many years. However, employees who now enjoy post-employment income protection cannot be expected to readily accept the elimination of severance pay or the reduction in pension benefits. Employers, on the other hand, particularly in those industries which are financially strapped, cannot be expected to simply supplement current severance plans with a new influx of cash. The decision, therefore, holds the potential for creating substantial new labor unrest.

II. THE THIRD CIRCUIT'S DECISION THAT SECTION 4 (f)(2) OF THE ADEA PROTECTS ONLY THOSE BENEFIT PLANS WHICH REFLECT AGE-RELATED COST FACTORS IMPOSES A STANDARD NOT INTENDED BY CONGRESS AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Third Circuit interpreted the ADEA's section 4(f)(2) defense[21] as applying only to those employee

[21] Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), provides that it shall not be unlawful for an employer or labor organization "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . ."

benefit plans that reflect age-related cost factors, holding: "[i]n order to qualify as exempt under § 4(f)(2), a plan must involve age-related cost factors: *i.e.* the cost of providing benefits pursuant to the plan must increase with age." 869 F.2d at 710 (citations omitted).

A conflict exists among the circuit courts regarding whether section 4(f)(2) of the ADEA protects only those plans that reflect age-related cost factors. In addition to the Third Circuit in the present case, the Sixth Circuit has held that section 4(f)(2) applies only to those plans where the cost of providing the benefit increases with age. *Betts v. Hamilton County Bd. of Mental Retardation*, 848 F.2d 692, 694 (6th Cir.), *prob. juris. noted sub nom. Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 256 (1988). The Seventh Circuit also adopts this view. *Karlen v. City Colleges*, 837 F.2d 314, 319 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988).

In contrast, the Second, Fifth, Ninth, and Tenth Circuits have held that age-related cost justification is not the exclusive means of establishing that the section 4(f)(2) defense applies. *EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988); *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988); *Cipriano v. Board of Educ.*, 785 F.2d 51, 54-55 (2d Cir. 1986); *Alford v. City of Lubbock*, 664 F.2d 1263, 1268-70 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 216-17 (5th Cir. 1974).[22]

This issue is also raised in *Public Employees Retirement System v. Betts*, No. 88-389 (U.S. argued Mar. 28,

---

[22] In the best reasoned decisions, the courts have rejected the Third Circuit's narrow view of section 4(f)(2) as applying only to the statutorily enumerated benefit, retirement, pension, or insurance plans. These decisions conclude that the list is only illustrative and indicate that plans that do not have an age-based cost relationship, such as profit-sharing plans, are protected by section 4(f)(2). *Alford*, 664 F.2d at 1272, 1272 n.10; *Brennan*, 500 F.2d at 215-17.

1989). Thus, this Court may resolve this issue in the *Betts* case. In such case, Amicus Curiae agrees with Westinghouse that the Court should dispose of that aspect of Westinghouse's petition as is appropriate in light of the Court's decision in *Betts*.

The current uncertainty engendered by the split among the circuit courts of appeal with respect to this issue must be resolved. Many contracts in the meat packing industry, as well as other industries, cover thousands of employees, and contain provisions which in some manner integrate severance and retirement pay benefits. AMI submits that such plans fulfill a very important purpose, and in some industries hard hit by plant closings, an essential function. Given the national scope of these contracts, however, unions and employers may have to capitulate to the holding of the Third Circuit unless the issue is resolved expeditiously and authoritatively by the Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT G. HIBBERT
MONTE B. LAKE *
DOMINIC T. BODENSTEINER
HERON, BURCHETTE, RUCKERT
& ROTHWELL
1025 Thomas Jefferson St., N.W.
Suite 700
Washington, D.C. 20007
(202) 337-7700
Attorneys for Amicus Curiae
the American Meat Institute

* Counsel of Record

June 1, 1989